No. 12,373

IN THE

United States Court of Appeals

For the Ninth Circuit

JOHN STOPPELLI,
Appellant,

vs.

UNITED STATES OF AMERICA,
Appellee.

APPELLANT'S OPENING BRIEF.

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STATEMENT OF FACTS.

On October 31, 1948 the Government witness, with an informer, went to a hotel in Oakland, California and went up to room 306. As the Government witness was entering the hotel, defendant Ballard came out, entered an automobile, drove away and returned in a few minutes with defendants McDonough and Ingoglia. Defendants Ballard and Ingoglia then entered the hotel. The Government witness was at this time in Room 306 and had made arrangements with defendant Leeper to buy heroin. While the Government witness was in the room with defendant Leeper, there was a knock on the door and defendant Leeper opened the door, reached outside, bringing in

a package containing 12 letter-size envelopes in which envelopes there were other sealed cellophane envelopes containing diluted heroin. The letter-sized envelopes were of the common variety purchasable in any stationery or dime store. Defendants Ballard and Ingoglia were found immediately in the hallway.

A portion of one fingerprint claimed by the witness Greene to be that of defendant Stoppelli was subsequently found to be on the outside of one of the letter-sized envelopes; not the cellophane envelopes.

There was no evidence showing Stoppelli to have been in California on October 31st, 1948, or at any other time.

There is no evidence that Stoppelli knew any of the defendants, or that there was ever any contact between Stoppelli and defendants or their agents, either oral or otherwise.

The appealing defendant John Stoppelli, with four other defendants, was charged in the three-count indictment as follows:

First Count: That defendant John Stoppelli, along with the co-defendants named therein, did unlawfully sell, dispense and distribute 10 ounces and 436 grains of heroin in twelve (12) envelopes.

Second Count: That defendant John Stoppelli, along with the co-defendants, did fraudulently and knowingly conceal and facilitate the concealment of said quantity of heroin.

Third Count: That defendant John Stoppelli and the other four defendants conspired together to commit the substantive offenses set forth in Counts 1 and 2.

All defendants were convicted on all counts.

The defendant John Stoppelli did not take the stand.

The defendant John Stoppelli was granted a new trial on the conspiracy count.

He appeals the conviction on Counts 1 and 2.

ARGUMENT.

I.

THE EVIDENCE IS INSUFFICIENT TO SUPPORT THE VERDICT OF GUILTY AGAINST THE DEFENDANT AND APPELLANT ON THE FIRST AND SECOND COUNTS OF THE INDICTMENT.

A thorough examination of the evidence discloses no act or word on the part of John Stoppelli. He did not sell or dispense or distribute any of the twelve envelopes of heroin. Stoppelli did not at any time or place fraudulently conceal and facilitate the concealment of any quantities of heroin.

There is not one word in the evidence concerning Stoppelli knowing the other defendants, or having seen them, or having talked to them, or having been connected with them or having aided or abetted them.

There is no evidence that Stoppelli was ever in California, except for the purpose of this trial.

The evidence thus failing to disclose Stoppelli's commission of the substantive offenses, the guilty verdict must necessarily rely solely upon the statutory presumption set forth in the Harrison Narcotic Act, upon which Count 1 is based, and a similar presumption in the Jones-Miller Act upon which Count 2 is based, that one found in possession of a narcotic will be presumed to be guilty of a violation of said statute unless he satisfactorily explains the possession.

The applicability of such presumption necessarily presupposes that the evidence establishes beyond reasonable doubt the fact that defendant Stoppelli was in possession and control of the heroin mentioned in the indictment. Without such evidence, the presumption is meaningless. It is, therefore, fundamental and imperative to the Government's case that it prove Stoppelli had dominion, control and possession of the heroin.

An examination of the record fails to establish even the thinnest thread of evidence that Stoppelli was ever possessed of the heroin. The only evidence found casts but the barest suspicion on the question of Stoppelli's possession. Suspicion will not warrant conviction of crime.

The only evidence against Stoppelli (in the 400-page transcript) consists of a fingerprint impression

on one of the twelve letter-type envelopes. There is no fingerprint on the cellophane envelopes which actually contained the heroin. It is opinion evidence. The weight of this evidence only establishes that at some time one finger of the left hand of Stoppelli came into contact with the envelope in question. It establishes no more. It does not by direct evidence or inference establish that there was heroin in the envelope.

The only other evidence connecting Stoppelli is based upon conjecture, surmise and speculation by the testimony of Harold Greene, a Government witness.

Examining the evidence on this point we find the only real evidence is that the print of one finger of appellant Stoppelli was found upon an envelope, in which envelope when found there was another cellophane envelope containing heroin. Mr. Greene, a Government employee, and an eager witness, then testifies to what purports to be an expert opinion to the effect that there was a powdery substance in the envelope when the finger print was put thereon. The record shows such statement is not worthy of being classed as an opinion; it is speculation and guessing.

The testimony of the witness Greene shows it to be only a guess, as will be seen from the following quotations:

> "Q. And what would you say—what kind of substance, if you know, did it contain?
>
> A. Well, from my experience it had to be a powdery substance, for the simple reason that the

intensity of the fingerprint, the latent fingerprint on this particular envelope, shows that the right side as you look at it, or the left side of the fingerprint itself, that the duct covering a part of the delta, the duct on the ninth finger of the left hand, that when there is a powder in an envelope of any type, and especially after it has been placed in the glassine envelope and placed in this envelope, that anyone that grasps the envelope, there is a movement of the powder inside, because naturally we have to put more pressure on the holding of an object in this case with that content in the envelope than you would if the envelope was just as it is now."

(Tr. p. 264.)

Greene's answer three questions later shows that the statement "It had to be a powdery substance" is only a guess, if not untrue:

"A. In that fashion (indicating). As the movement of the powder inside the envelope or the two envelopes sort of moved, because he had to exert a little pressure. You still would not get the bulged surface or, I would say, the concavity surface of the material in the package. You would get a concavity in the package after you placed the finger by gripping it, the same as we have all had the experience of buying sugar in a bag in a store, and when you grasp the bag of sugar, your fingers to a certain extent, one side or the other, each finger will make an impression in the bag as you hold it."

(Tr. p. 265.)

Sugar is granular, not a powder; yet Greene says sugar would have the same effect he claims for a

"powdery substance". Beans, macaroni, rubber or any other granular, soft or movable substance could have the same effect.

Everyone knows that when fingerprints are taken by the Government or by the police, a hard surface is used to obtain a perfect print. According to Mr. Greene, the Police Department would get much better prints if they had a soft substance on which the finger was placed to take the print. It is evident that Greene's conclusion that a "powdery substance" was the base on which the fingerprint herein was made because of its intensity is unfounded.

Greene shows by his own admissions that a powdery substance is only one of hundreds of substances that could have had the same effect as the background or base for a fingerprint. His alleged "expert opinion" of a powdery substance is nothing more than wishful thinking. If we are going to speculate as to what was the base on which the alleged fingerprint was made, let us speculate on the presumption of the innocence of Stoppelli. Suppose the envelope were lying on a table. Many of us place a hand on a table when standing by it. This would furnish a hard base for the making of the fingerprint. On the other hand, suppose this envelope was on the outside of a bunch of envelopes in a store and Stoppelli was buying envelopes. He could have very easily picked up that bunch with his left hand and then replaced them; deciding to buy a different bunch. It is, therefore, evident that it is just as easy to presume that this one fingerprint was innocently placed on the envelope as

the manner in which W. Harold Greene assumes. Of course, Mr. Greene is eager to create the inference that heroin was in the one envelope when handled by Mr. Stoppelli. He has to put a powdery substance in the envelope in order to accomplish his mission as a "fingerprint expert".

The testimony that a "powdery substance" was in the envelope is thus proven to be only wishful thinking. This fact arrived at by such process cannot be the foundation for a fact that heroin was in the envelope when it was handled by Stoppelli. Such a guess by Greene is not establishing what, if anything, was in the envelope to a moral certainty and beyond a reasonable doubt. It is elementary and the authorities are clear that each fact of a chain of circumstantial evidence must be clearly established. The prosecution's case, therefore, as a matter of law failed to clearly establish that any substance, much less heroin was in the envelope when the alleged fingerprint of Stoppelli was placed on the one outside envelope.

If anything is done with this evidence, it must be resolved in favor of Stoppelli.

Furthermore, an examination of Section 174 of the Jones-Miller Act, on which Count 1 is based, discloses that the statutory presumption arises out of the following language contained therein, to wit: "where defendant is shown to have possession or to have had possession." An examination of Section 2553 of the Harrison Narcotic Act, upon which Count 2 is based, discloses the presumption arises out of the

following language: "The absence of an appropriate tax paid stamp from any of the aforesaid drugs shall be prima facie evidence of a violation of this subsection by the person in whose possession same may be found." There is, therefore, absolutely no evidence upon which a conviction of Stoppelli under Count 2 can be based since the evidence totally fails to show that even one envelope was found in the possession of Stoppelli. There is not even an inference arising from the evidence in this case to show that Stoppelli was found in possession of the heroin. In fact the very evidence introduced by the prosecution negates this proposition and shows the heroin to have been found in the possession of others. It is, therefore, inconceivable that Stoppelli can be guuilty of a violation of Count 2 of the indictment.

The evidence to warrant a conviction under Count 1 of the indictment is likewise insufficient; for, as has been pointed out, there is no evidence showing Stoppelli to have had possession at any time except the opinion evidence of Green, which is nothing more than sheer speculation.

For the sake of comparison with the case at bar, Circuit Courts have held the evidence insufficient to warrant conviction in cases where the evidence is more conclusive against defendants than here.

In *Ching Wan v. United States,* 9th Cir., 35 F. (2d) 665, the appellant Wan delivered an envelope to a Government witness in Honolulu and asked the witness if he would deliver the envelope to Gum at an ad-

dress in San Francisco. The witness delivered the envelope to Gum, and a few days later met Gum in the latter's car, at which time they drove a few blocks when Gum directed the witness to enter another car driven by appellant Lett. After entering the car, the witness at his own request was driven by appellant Lett to the express office. Upon arrival appellant Lett directed the witness to get out and do as he was instructed. The appellant Lett then assisted the witness in removing the box from the car which appellant Lett had operated. The box was shipped to Honolulu, where it was seized by Government agents. As to the appellant Lett, the Court held at page 666:

> "As to the appellant Lett the case is entirely different. His only connection with the transactions involved on this appeal was as above set forth. It was not shown that he had any knowledge of the contents of the box transported by him or of the criminal purposes of the other parties. He simply drove the automobile containing the box to the express office at the request of the witness Rosa, aided him in removing the box from the automobile, told him to do as instructed, and refused to wait for him at the express office when requested so to do. As said in Sugarman v. U. S., CCA, 35 F. (2d) 663, just decided, 'whatever suspicion these facts and circumstances may give rise to they are in our judgment legally insufficient to support a verdict of guilty.'"

In the above cited case the facts disclosed that a box of opium was in a car driven by appellant, that the appellant did handle the box containing the opium,

that he did tell the witness to do as instructed. These facts, although they only give rise to a suspicion, not warranting conviction, are, when compared with the evidence against Stoppelli, more conclusive of guilt than the facts in the case at bar. There is no evidence that the envelope herein contained heroin at the time the fingerprint was made; at the most, there is nothing but suspicion.

In *Morei v. U. S.,* 6th Cir., 127 F. (2d) 827, the court stated at page 836:

> "That he was the employee of the man who bought the heroin; and that he was close to the scene of the crime is entirely explicable and consistent with his innocence; and there was no other evidence sufficient to overcome the presumption. Suspicion is not such evidence. Laying aside *unjustified and speculative inferences* a careful consideration of all of the evidence in this case relating to the defendant Evans leads to the inescapable conclusion that in going to Youngstown and back and in driving the two men to the rendezvous arranged by Morei, and in all of the other situations as disclosed by the record, he conducted himself exactly the same as he would have done had he been engaged in legitimate employment. In reviewing criminal convictions we do not pass upon the weight of the evidence. That is for the jury. But in this case there was no evidence against Evans to warrant submission of the question of his guilt to the jury, and his motion to direct a verdict of not guilty should have been granted."

In the case at bar we have no evidence above the barest suspicion. A conviction is not warranted on in-

ference and speculation alone, without basis in fact. It may be stated as a general rule that circumstantial evidence can only warrant conviction if an inference may reasonably and logically be drawn from a proven fact which is more consistent with guilt than innocence.

In *Kassin v. United States,* 5th Cir., 87 F. (2d) 183, the Court held at page 184:

> "In each case, however, where the evidence is purely circumstantial, the links in the chain must be clearly proven, and taken together must point not to the possibility or probability, but to the moral certainty of guilt. That is, inferences which may reasonably be drawn from them as a whole must not only be consistent with guilt, but consistent with every reasonable hypothesis of innocence.
>
> One of the prime rules in the trial of criminal cases is that circumstances when relevant and cogent may constitute evidence of guilt, but they must have a legal, as well as logical, relevancy, and they must have probative force; that is, they must point with compelling force to the facts to be proven. Circumstances which merely raise suspicion, or give room for conjecture are not sufficient evidence of guilt."

A comparison of the facts of this case with the rules stated in *Kassin v. United States,* supra, clearly establishes that the testimony as to guilt of Stoppelli does not point with compelling force to the possession of narcotics. It is only by suspicion that we have any evidence of possession by Stoppelli.

In *Philyaw v. United States,* 8th Cir., 29 F. (2d) 225, at page 227, the court states the general rule to be:

> "In a criminal case, there must be evidence of all of the materal facts alleged in the indictment, or evidence from which a natural and proper inference can be drawn; that such facts actually existed. It is a well recognized rule in all jurisdictions that, to warrant a conviction upon circumstantial evidence alone, the facts proven must not only be consistent with the guilt of the accused, but they must also be inconsistent with any rational theory of his innocence. There is evidence from which it could be properly assumed that the defendants owned the liquor found. But wherein are the facts from which a natural inference can be drawn that he removed it or concealed it after removal *unless it be an assumption based on an assumption?*"

As set forth in *Philyaw v. United States,* supra, there must be evidence of all the material facts alleged in the indictment. In the case at bar there is no evidence whatsoever of any of these material facts, to-wit: selling, dispensing or concealing narcotics. There is no evidence of guilt even with the aid of the statutory presumption of the statute. We not only have to exercise the statutory presumption, but that presumption must itself be based upon an inference giving rise to the fact of possession, which is nothing more than an inference based upon a presumption, which, as set forth in *Philyaw v. United States,* supra, cannot warrant a conviction.

The facts here are in no sense wholly consistent with guilt and inconsistent with any other reasonable hypothesis.

It is therefore respectfully submitted that the evidence is insufficient to warrant the conviction of Stoppelli.

II.

THE DEFENDANT AND APPELLANT JOHN STOPPELLI WAS SUBSTANTIALLY PREJUDICED AND DEPRIVED OF A FAIR TRIAL BY REASON OF THE MISCONDUCT OF THE WITNESS W. HAROLD GREENE WHILE TESTIFYING FOR THE GOVERNMENT.

The Government witness W. Harold Greene was guilty of misconduct which substantially prejudiced the defendant and deprived him of a fair trial. Mr. Greene's testimony is:

> "Q. Now, how did you come to that conclusion that the print on the envelope is the print that belonged to John Stoppelli, the defendant?
>
> A. We have a National Book, every District Supervisor in the Country, in the Narcotics Bureau, has a national book published by the Narcotics Bureau, all of the major known——"
>
> (Tr. p. 254.)

These very words are so shocking that they shriek of injustice. This is not mere harmless error, but is prejudicial error of the most flagrant nature. The law itself is imbued with abhorrence to evidence of this nature. Yet, Mr. Greene has accomplished by his very testimony what he could not do under the law.

Under no conceivable reasoning can it be said that these words did not become imbedded in the minds of the jurors. The import of these words when such testimony is taken as a whole is that the Narcotics Bureau has a record of all major known narcotic peddlers. It is the obvious inference from the words spoken by Mr. Greene that Mr. Stoppelli has a criminal record, is a man of criminal propensity, and is a known narcotic peddler.

The record (Tr. p. 254) shows that this statement was volunteered by W. Harold Greene, an experienced witness. If this answer were in direct response to a question a different situation might be presented. The fact that it was volunteered increases the error. It will be noticed in the record that the Assistant U. S. Attorney, Mr. Karesh, admonished Mr. Greene, his own witness, that he had not answered the question. The trial judge was most surprised by the statement of Mr. Greene, and recognized its prejudicial effect at once. This is shown by the somewhat lengthy statement by the trial judge at this point.

This course of conduct by the Government's witness which reeked with its prejudicial effect not only occurred once in the trial, but twice. Not having done enough damage he testifies again:

> "A. In my opinion he grasped it this way (indicating), *which would be the natural way for placing something in the envelope with the right hand and, after all, men of experience of that type* * * *"
>
> (Tr. p. 265.)

Again, we are confronted with the fact that the Government witness pointed out to the jury that Stoppelli was a dealer in narcotics.

Add to Greene's testimony portions of the damaging opening statement made by the prosecuting attorney and it is plainly visible how the jury was influenced and prejudiced against Stoppelli.

> "We will also show, ladies and gentlemen of the jury, during the course of the trial, that the defendant John Stoppelli—and we will show it by fingerprint evidence, conclusive fingerprint evidence, that a quantity of that heroin in question in that envelope, in one of the envelopes, was handled by the defendant John Stoppelli." (Tr. p. 34.)

The prosecuting attorney, apparently not satisfied, restates his position:

> "On the theory of law of aiding and abetting, we will show that all of them violated the Harrison Narcotic Act, all of them violated the Jones-Miller Act, and all of them conspired to violate these acts, and we will also ask you to bear in mind during the course of the trial, that the Government does not have to show that John Stoppelli handled all of the narocotics in the envelopes. If he handled the narcotics in one envelope, if he handled one ounce of narcotics, or a half ounce, or 5 grains, it is as though he handled, possessed, concealed, aided and abetted in the concealment and the sale of all the narcotics in all of the envelopes."
>
> (Tr. p. 34.)

To tie-in Stoppelli with the testimony of Greene, the prosecuting attorney said further:

> "The offenses charged took place in Oakland and in other places. Now, members of the jury, I ask you to bear in mind throughout the course of the presentation of the Government's case that if a man puts in action a criminal force, let's say in New York, in the State of New York, and ultimately the crime is consummated in the State of California, even though the man is in New York, because he set the criminal force loose and the force was consummated or the act was consummated in California, he is guilty of a violation of the law in California." (Tr. p. 30.)

There is not one word of testimony in the record to substantiate the claim of the prosecuting attorney.

> "* * * that anyone who aids and abets in the commission of a crime is as guilty as the person who commits the crime. In other words, if there is a person in the State of New York who sends narcotics to the State of California, and those narcotics are possessed in California and are sold in California, that person who sends the narcotics to California is as guilty as the person who possesses the narcotics in California and who sells the narcotics in California, and is likewise guilty of a criminal conspiracy to violate the Act."
>
> (Tr. pp. 30-31.)

That these words would prejudice a defendant is obvious. They are all the more shocking in the case of defendant Stoppelli when we consider the thin, if any, evidence offered to prove his guilt.

As is said in *Templeton v. United States,* 6th Cir., 151 F. (2d) 706, the evidence of Stoppelli's guilt was not so overwhelming as to render harmless the prejudicial nature of this testimony.

We cannot explore the minds of the jurors, nor does the law require the defendant to do so to prove in fact that these words influenced the verdict. It is sufficient if their probable effect would be to prejudice the minds of the jurors against the defendant. There is only one logical deduction, and that is, that the jury could not erase the words spoken by Greene.

In *Kotteakos v. United States,* 328 U. S. 750 at page 765, the court says:

> "The inquiry cannot be merely whether there was enough to support the result, apart from the phase affected by the error. It is, rather, even so whether the error itself had substantial influence. If so, or if one is left in grave doubt, the conviction cannot stand."

If a grave doubt is raised, the conviction cannot stand. The words spoken by Greene not only raise a great doubt, but the evidence introduced, standing alone and apart from the error, consists of only speculative inferences.

The severity of the words of the witness Greene remain in effect all the more prejudicial because of their general scope, namely, that every District Narcotics Supervisors' Office in the country had a record of Stoppelli. We cannot for a moment assume (where the liberty of the defendant is at stake) that these

words did not prejudice and influence the minds of the jurors.

The law itself will not assume such a fact and where an error of the flagrant nature of the words spoken by Greene exists, the court will not assume that a mere instruction to the jury to disregard the remarks will in itself cure the harmful effect of such evidence.

The only logical inference that can be drawn is that these words continued to influence the jurors after they retired for their deliberations and that the deliberations were influenced in view of the unsubstantial nature of the evidence in this case. The logical inference is that defendant Stoppelli would have in all probability been acquitted but for the prejudicial effect of these words on the jurors.

In *Hatchett v. United States,* 293 Fed. 110, the defendant was prosecuted for larceny. The arresting officer testified that he obtained a photograph of a party by the name of John Brown from a gallery and that after obtaining the picture he confronted the defendant with it and the defendant admitted it was he. The court at page 1012 stated:

> "While there may have been and probably was, competent evidence warranting conviction, it would be going far to say that the appellant was not prejudiced by the admission of this incompetent evidence. He was entitled to a fair and impartial trial and that he could not have, after it was made to appear, through the introduction of incompetent evidence, that his picture adorned

> the rogues gallery, in connection with his arrest in Philadelphia for a similar offense; in other words, that with criminal propensities, he had operated elsewhere and under another name."

The evidence in this case prejudiced Stoppelli in every respect the defendant was prejudiced in the *Hatchett* case.

In *Smith v. United States,* 9th Cir., 10 Fed. (2d) 787, a narcotics case, the defendant was charged with selling narcotics and evidence was introduced to show that the defendant had in the past been so engaged. The court stated at page 788:

> "The effect of the admission of the testimony so complained of was to show or tend to show against the accused the commission of crimes independent of that for which he was on trial."

In 328 U. S. 750, *Kotteakos v. United States,* the Supreme Court held at pages 764 and 765:

> "If when all is said and done, the conviction is sure that error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand, except perhaps where the departure is from a constitutional norm or a specific command of Congress. Bruno v. U. S., supra, at 294. But if one cannot say, with fair assurance, upon pondering all that happened, without stripping the erroneous action from the whole, that the judgment was not substantially swayed by the error, it is impossible to conclude that substantial rights were not affected. The inquiry cannot be merely whether there was

enough to support the result, apart from the phase affected by the error. It is rather, even so, whether the error itself had substantial influence. If so or if one is left in grave doubt, the conviction cannot stand."

And further in *Gold v. United States,* 2nd Cir., 26 F. (2d) 185, the court stated at page 186:

"As stated in People v. Caruso, 246 New York 437, 159 N. E. 390, 'the greater the doubt of guilt, the more likely that prejudice results from errors in the trial.' See Fliashnick v. U. S., 223 F. 736 (C.C.A. 2) the Government's case was not so clear that the error can be deemed unsubstantial."

In *United States v. Dressler,* 7th Cir., 112 F. (2d) 972, the jury was inadvertently allowed to take to the jury room a criminal record on file in the U. S. Bureau of Investigation, Department of Justice. At page 977, the court stated:

"The Government does contend, however, that the cause of defendant was not prejudiced by the consideration of such information by the jury.

It is inconsistent with our traditional conception of a fair trial to permit any information to go to a jury which might influence the jury to convict a defendant for any reason other than that he is guilty of the specific offense with which he is charged."

The court further at page 977 quoting from *Boyd v. United States,* 142 U. S. 450, stated:

"Proof of them only tended to prejudice the defendants with the jurors, to draw their minds away from the real issue, and to produce the impression that they were wretches whose lives were of no value to the community, and who were not entitled to the full benefit of the rules prescribed by law for the trial of human beings charged with crime involving the punishment of death."

The court further at page 978 stated:

"In *Little v. U. S.* the following statement of the court makes the governing rule clear: '* * * Where error occurs, which, within the range of a reasonable possibility, may have effected the verdict of a jury, appellant is not required to explore the minds of the jurors in an effort to prove that it did in fact influence the verdict. * * * The record failing affirmatively to disclose that no prejudice did result, the verdict cannot stand."

In *Middleton v. United States,* 8th Cir., 49 F. (2d) 538, the court stated at page 540:

"A consideration of all of the evidence leads to the conclusion that the prejudice against the defendant was not removed by the laudable endeavor of the court to withdraw the evidence or by the instruction that it be disregarded."

In *Sang Soon Suv v. United States,* 9th Cir., 167 F. (2d) 431, the prosecution was for income tax evasion and evidence admitted showed that defendant was convicted for possession of opium. The court held at pages 432 and 433:

"Evidence of the character complained of in this case has been held to be of such a prejudicial character that cautionary instructions on the part of the court to disregard it after it has been erroneously introduced cannot cure its harmful effect. Boyd v. U. S. 142 U. S. 450, 458, 12 S. Ct. 292, 35 L. Ed. 1077."

In *Templeton v. United States,* 6th Cir., 151 F. (2d) 706, the court at pages 707 and 708 stated:

"Little need be said upon the question of whether the improper evidence was prejudicial. The evidence of appellant's guilt was not so overwhelming as to render harmless the incompetent evidence complained of without any foundation in fact for showing such a connection with appellant, who was charged with a violation of the liquor laws, with Carter, a reputed criminal of the same type. Had it not been admitted the defense of an alibi would have had a basis sufficient to justify the jury in returning a verdict of not guilty."

An examination of the above cases clearly indicates that the error complained of was so prejudicial to his rights to a fair trial that the conviction under counts 1 and 2 must necessarily be reversed.

III.

THAT THE PROPER VENUE AND PLACE OF TRIAL FOR THE SUBSTANTIVE OFFENSES CHARGED AGAINST THIS DEFENDANT WAS THE SOUTHERN DISTRICT OF NEW YORK, AND NOT THE NORTHERN DISTRICT OF CALIFORNIA.

There is a total failure of proof of venue to establish jurisdiction of the District Court for the Northern District of California. No evidence whatsoever was introduced to prove venue in the case at bar. The proper venue and place of trial for the substantive offenses charged against defendant Stoppelli was the Southern District of New York, and not the Northern District of California. There is not one line of evidence in the record to show that defendant was ever in the jurisdiction of the Northern District of California except for the purpose of this trial. It is the fundamental right of the defendant to be tried within the jurisdiction of a court in which the alleged crime was committed. Rule 18 of the Federal Rules of Criminal Procedure so provide and this right is guaranteed to the defendant by the Sixth Amendment to the Constitution of the United States.

In order to sustain the conviction of Stoppelli, the court would necessarily have to infer: first, that Stoppelli had possession of the envelope in the Northern District of California; and second, in order to warrant conviction would have to infer that heroin was contained in the envelope, which would be nothing but an inference based upon an inference.

If we presuppose possession, which we would necessarily have to do, the question then arises as to

whether the statutes can be interpreted to raise a presumption of venue. A careful examination of the statutes upon which Counts 1 and 2 are based discloses that the language of these statutes fail to raise any presumption of venue. This question was considered by the 9th Circuit Court in *Mullaney v. United States,* 82 Fed. (2d) 638, in which case the court at page 641 stated:

> "This court expressly held in Casey v. U.S., 20 F. (2d) 752, that the presumption contained in the statute extended also to venue. This was approved on appeal Id., 276 U.S. 413, 48 S.Ct. 373, 72 L.Ed. 632."

It is respectfully submitted that the case of *Mullaney v. United States* did not intend to lay down a general rule that there would be a presumption of venue in every case in the total absence of any proof thereof.

It is noted that the *Mullaney* case is based on the decision rendered by the 9th Circuit Court in *Casey v. United States,* 20 F. (2d) 752, as upheld by the Supreme Court in 276 U.S. 413. A careful examination of the opinion rendered by Justice Holmes in that case discloses that the court stated as follows at pages 417 and 418:

> "But we are of the opinion that *upon the facts of this case the court was right.* If the jury believed that the defendant, long established in Seattle, said that he had not the drug, but would and shortly thereafter did, furnish it, inference that he bought it in Seattle is strong, and it is reasonable to suppose that if attention had been

called to the point the inference could have been made stronger still."

It is respectfully pointed out that the Supreme Court in discussing *Casey v. United States,* supra, specifically held that under the facts of that case the court was right and then went on to discuss the inference arising that he bought the drug in Seattle. It is therefore respectfully submitted that the Supreme Court did not intend to approve the *Casey* case as standing for the all conclusive proposition that the statutory presumption contained in the statute was equally applicable to venue as it was to guilt of the substantive offenses contained therein. The approval of the *Casey* case by the Supreme Court stands for no more than the proposition that the Circuit Court in the *Casey* case was right on the particular facts of that case.

If the Supreme Court intended to approve the *Casey* case as standing for the proposition that there was a statutory presumption of venue in the total absence of proof thereof, the language referring to the particular facts of the case and the inferences arising therefrom is meaningless and superfluous. It is felt that the *Mullaney* case in line with the *Casey* case intends to stand for no more than the proposition that a presumption will arise in the absence of proof of venue only when an inference of venue can be drawn from the particular facts of the case.

In the case at bar there is no evidence whatsoever that Stoppelli was ever within the Northern District

of California until he voluntarily entered the District for the purposes of this trial. There is therefore nothing in the case at bar upon which an inference of venue can be based. It is, therefore, felt that the rule of law as set forth in *Brightman v. United States,* 8 Cir., 7 F. (2d) 532, is applicable under the facts of the case at bar. In *Brightman v. United States,* supra, the court set forth the rule of law to be as follows at page 534:

> "The presumption of the statute alone, however, was not sufficient for conviction. Before the defendant could properly be convicted, it was necessary for the Government to go further and prove that venue was the Western District of Oklahoma. This was a prerequisite to a conviction, and the foundation of this prerequisite is contained in the 6th Amendment to the Constitution of the United States which provides: 'In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

The *Brightman* case quoted as follows from *Vernon v. United States,* 146 Fed. 121, stating:

> "In the Vernon case this court said 'Under this constitutional provision the venue is as material as any other allegation in the indictment and the burden to prove it rests upon the Government.
>
> It might be claimed that the prima facie evidence arising under the statute renders proof of venue unnecessary. We do not think the presumption of prima facie evidence of statute in-

cludes the venue. The wording of the statute does not indicate such an intention on the part of Congress.' "

In a very recent case decided in 1949, *United States v. Jones,* 7th Cir., 174 F. (2d) 747, the court at pages 748 and 749, stated:

"The motion for a directed verdict raises the question as to sufficiency of the evidence to support the verdict of a jury or findings of the court. One of the things that the Government has the burden of proving is venue. It is an essential part of the Government's case. Without it there can be no conviction."

"We pass to the sufficiency of the proof of venue. Venue does not have to be proved by direct and positive evidence. If upon the whole evidence, it may reasonably be inferred that the crime was committed where the venue was laid, that is sufficient."

It is respectfully submitted that under the facts of the case at bar, the rule of law as established by the above cited cases is applicable, namely, that there must be some evidence of venue in order to warrant a conviction of the defendant Stoppelli.

Wherefore, it is respectfully submitted that a new trial should be granted to the appellant.

Dated, San Francisco, California,
December 14, 1949.

J. W. EHRLICH,
Attorney for Appellant.